88-1811

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MICHAEL J. MAJOR - PETITIONER

vs.

PENNWELL PUBLISHING COMPANY - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL J. MAJOR,	(stamped filed 3/10/89)
Plaintiff-Appellant,	No. 87-2267
v	(D.C. No. 86-C-1083-B)
PENNWELL PUBLISHING COMPANY,	(N.D. Okla.)
Defendant-Appellee	

ORDER AND JUDGMENT*

Before ANDERSON and TACHA, Circuit Judges and ROGERS, District Judge.**

**The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.)

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiff appeals from a predominantly adverse judgment entered by the district

court following a bench trial of the two claims -- breach of contract and intentional infliction of emotional distress -- remaining after pretrial rulings had disposed of several associated causes of action asserted in this diversity contract and tort suit.

We have carefully reviewed the record, considered all of plaintiff's arguments in light thereof, and conclude that the district court's disposition was correct. We affirm the several rulings challenged on this appeal for substantially the reasons stated in the pertinent orders of the district court. In addition, we believe it important to commend the district court on its tempered condemnation of plaintiff's often abuse personal attacks on the presiding judge and others involved in this litigation. The tolerant but firm professionalism exhibited by the district court in this case was a exemplary as plaintiff's conduct was inappropriate.

The judgment entered by the United States District Court for the Northern District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

*This order and judgment has no precedial value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

IN THE UNTED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. MAJOR, Plaintiff, v. PENNWELL PUBLISHING COMPANY Defendant.	(stamped filed 8/20/87) No. 86-C-1083-B

JUDGEMENT

In accordance with the Finds of Fact and Conclusions of Law entered the 20th day of August, 1989, the Court enters judgment in favor of the Plaintiff, Michael J. Major, and against the Defendant, PennWell Publishing Company, on the breach of contract claim in the amount of Eight hundred Twenty and 83/100 dollars ($820.83), plus pre-judgment interest at the rate of 6% per annum from the date of February 1, 1986 to the date of judgment, which is $897.07, and post-judgment interest at the rate of 6.98% per annum from this date on the total sum of $897.07. Judgment is hereby entered in favor of the Defendant

PennWell Publishing Company, and against the Plaintiff, Michael J. Major, on Plaintiff's claim of intentional infliction of emotional distress. The parties are to pay their own respective court costs and attorneys fees. (Plaintiff appears pro se).

DATED this 20th day of August, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF OKLAHOMA IN AND FOR TULSA COUNTY

MICHAEL J. MAJOR,	)(stamped filed
	)6/23/86
Plaintiff,	)crossed out &
	)then stamped
v.	)filed 6/27/87)
	)
PENNWELL PUBLISHING COMPANY,	)No. SC 86-9317
	)No. CJ 86-4182
Defendant.	)
	)

ORDER OF TRANSFER

Now on this 23rd day of June, 1986, the court having heard the Defendant's Motion to Transfer, as permitted in 12 Oklahoma Statues, Section 1757, finds the Motion to Transfer is proper and orders this case transferred to Civil Docket.

IT IS HEREBY ORDERED that this case be and the same is hereby transferred from the Small Claims Docket to the Civil Docket of this Court. The Plaintiff has twenty days from this date to file a petition that conforms to the standards of the pleadings prescribed in the Oklahoma Pleading Code. The answer of the defendant shall be due

within 20 days after the filing of the petition and the reply of the Plaintiff in ten days after that answer is filed. If the Plaintiff ultimately prevails in the action so transferred by the Defendant, a reasonable attorney's fee shall be allowed to Plaintiff's attorney to be taxed as costs in the case.

JUDGE JAMES H. GRIFFIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL J. MAJOR,	(stamped filed 9/10/86)
Petitioner,	
v.	No. C86-953R
PENNWELL PUBLISHING COMPANY,	
Respondent	

ORDER GRANTING RESPONDENT'S
MOTION TO REMAND

THIS MATTER comes before the court on a motion by respondent PennWell Publishing Co-pany for an order remanding this action to the District Court of Tulsa County, State of Oklahoma and for its costs and attorneys' fees incurred in presenting this motion. The court has reviewed the documents submitted in support of and in opposition to the motion to-gether with the relevant files and records herein. Being fully advised, the court finds and rules as follows:

Petitioner's attempt to remove this case pursuant to 28 U.S.C. §1441(a) is patently

without merit. Petitioner is not a defendant within the meaning of that statute. Furthermore, even if he were, the Western District of Washington would not be the appropriate place to which to remove the case. Respondent's motion to remand is accordingly granted.

However, the court declines to impose sanctions on petitioner. Although his removal lacked any legal support, the court recognizes that he is a pro se litigant and not well-versed in the law. The court is, therefore, unable to conclude at this juncture that petitioner filed his petition in bad faith.

Finally, the court also notes that it has reviewed petitioner's allegations of attorney misconduct and finds no basis whatsoever for the conclusions which he draws from the described circumstances of his case. It would behoove petitioner to temper his rhetoric in light of the lack of any support

for his contentions.

Respondent's motion to remand is hereby GRANTED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 9th day of September, 1986.

BARBARA A. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL J. MAJOR, Plaintiff, v. PENNWELL PUBLISHING COMPANY, Defendant.	(stamped filed 11/21/86) No. C86-795TB

ORDER OF TRANSFER TO THE NORTHERN DISTRICT OF OKLAHOMA

THIS MATTER comes before the court on Defendant PennWell's Motion for an Order Transferring this Cause of Action to the Northern District of Oklahoma. The Court has reviewed the Motion, the memoranda submitted by counsel for the Defendant PennWell, the memoranda submitted by Michael J. Major, and the records and files herein, and rules as follows:

Under 28 U.S.C. 1404(a) the Court has authority to transfer a cause of action to any other district where it might have been brought originally for the convenience of parties and witnesses and where such transfer serves the

interest of justice. The plaintiff has filed this cause of-action in theWestern District of Washington alleging jurisdiction based on diversity of citizenship. In civil actions based on diversity, an action may be brought only in the judicial district where all the plaintiffs or all the defendants reside or in which the claim arose. 28 U.S.C. 1391(a). The plaintiff has alleged that he is a citizen of the State of Washington. The Defendant PennWell Publishing Company is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. The Defendant Didstrict Court of Tulsa County of the State of Oklahoma initially named in the plaintiff's second and third causes of action has its principal place of business in Tulsa County, Oklahoma[1].

1. The plaintiff gave notice of voluntary dismissal of the District court of Tulsa County of the State of Oklahoma on November 10, 1986.

The cause of action arose out of a contract between the Plaintiff and the Defendant Penn-Well Publishing Company and out of an action for breach of contract involving the above-named defendants as well as the court of Tulsa County. The weight of the contacts of the parties to this action is in the Northern District of Oklahoma. This cause of action could have been brought in the Federal District Court for the Northern District of Oklahoma originally.

The transfer of this cause of action to the Northern District of Oklahoma will serve the convenience of witnesses. The Defendant PennWell's employees involved in this transaction reside in Oklahoma and in the immediate vicinity. Various personnel of the Tulsa County Court located in Tulsa, Oklahoma, are named witnesses. All of the named witnesses except for the plaintiff reside in the Northern District of Oklahoma. If trial of this matter is transferred

to the Northern District of Oklahama, counsel will have ready access to proof and the availability of compulsory process.

If a case based on diversity of citizenship, consideration should be given to judicial familiarity with a governing state law. In this case, at least the second and third cause of action will be determined by Oklahoma law. Further, the District Court for the Northern District of Oklahoma is in the best position to determine the appropriate forum for plaintiff's first cause of action. Therefore, it will serve the interest of judicial economy and the interest of justice to transfer this cause of action to the Northern District of Oklahoma. Based on the foregoing opinion, it is hereby

ORDERED the Defendant PennWell Publishing Company's Motion for Transfer of this Cause of Action to the Northern District of Oklahoma is hereby GRANTED. It is further

ORDERED this cause of action is transferred

to the Northern District of Oklahoma. It is further

ORDERED the Clerk of this Court shall forward all documents filed under Cause Number C86-795TB to the Clerk of the Court for the Northern District of Oklahoma.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record and to the Plaintiff Michael J. Major.

DATED this 20th day of November, 1986.

ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. MAJOR Plaintiff, v. PENNWELL PUBLISHING COMPANY, Defendant.	(stamped filed 3/24/87) No. 86-C-1083-B

ORDER

This matter comes before the Court after a stauts conference and hearing on pretrial motions held March 19, 1987. The Court, after reviewing the status of the case and various filings now at issue, ordered the following:

The plaintiff's motion to amend his complaint to include claims for larceny and libel filed December 24, 1986, is hereby denied. The Court finds that the proposed amendments to the complaint to not state a viable claim and could not withstand a motion to dismiss by the defendant. The Court will not freely allow the amendment under Fed.R.Civ.P. 15 if the

amended pleading could be defeated by a motion for summary judgment or a motion to dismiss. Collyard v. Washington Capitals, 477 F Supp. 1247, 1249 (D.C.Minn. 1979).

The Court finds that the "larceny claim" sought to be added by the plaintiff merely arises out of the breach of contract claim already asserted by the plaintiff in his complaint. The Court finds that the plaintiff's larcheny claim fails to state a new claim upon which relief can be granted.

Likewise, plaintiff's libel claim is without merit and based upon an alleged statement made by an attorney for the defendant during the Washington federal court proceedings.

Plaintiff also contends that the defendant's answer and counterclaim filed in the Small Claims action in Tulsa County District Court is libelous. The Court is unpersuaded and finds no basis for the libel claim arising of the judicial proceedings in this case.

Therefore, the plaintiff's motion to amend his complaint is denied.

Furhter, the Court, after reviewing the repetitious and voluminous pleadings hereby orders the pro se plaintiff to secure the Court's written approval before any subsequent filings will be allowed in this case. In addition, the Court directs the plaintiff's attention to Fed.R.Civ.P. 11 which outlines the standard of conduct expected of persons who sign pleadings and motions for filing in a federal case. The plaintiff is encouraged to become familiar with Rule 11 and its requirements.

IT IS SO ORDERED this 24th day of March, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. MAJOR,	)	(stamped filed 4/21/87)
Plaintiff,	)	
v.	)	No. 86-C-1083-B
PENNWELL PUBLISHING COMPANY,	)	
Defendant.	)	

ORDER

This matter comes before the court on various pretrial motions filed by the parties. The court has reviewed the file, the legal arguments and authorities provided by the parties, and enteres the following order on the pending motions:

MOTION TO ADJUDGE PENNWELL GUILTY OF CONTEMPT

In the course of this litigation the plaintiff has filed twelve motions to adjudge PennWell Publishing Company ("PennWell") guilt of contempt and order PennWell to pay reasonable expenses and attorney's fees. In support of his motions, the plaintiff contends that objections and

motions filed by the defendant were submitted in bad faith for improper purposes, namely, to harass, to increase the cost of litigation, to libel the plaintiff, to deliberately misrepresent the facts with intent to deceive the court, all for the sole intent of delaying or obstructing justice. The court finds that none of the motions or objections referred to by the plaintiff in his motions were submitted in bad faith by the defendant and finds that the twelve motions to adjudge PennWell guilty of contempt are frivolous and a needless waste of scarce judicial resources. Therefore, the plaintiff's twelve separate motions to adjust PennWell guilty of contempt are overruled.

MOTIONS TO ADJUDGE PENNWELL EXECUTIVES GUILTY OF PERJURY AND TO ORDER PENNWELL TO PAY THE PLAINTIFF ALL EXPENSES, ATTORNEY'S FEES AND AWARDS STEMMING FROM THAT PERJURY

The plaintiff asserts that PennWell executives, Joseph A. Wolking, V. John Maney, Bruce D. Campbell and Robert Holton were guilty of perjury and contempt. In support

of those motions the plaintiff contends that affidavits filed by said executives were submitted in violation of the dictates of Fed. R.Civ.P. 11 and therefore constitute perjury. The court finds that these motions are but a further attempt by the plaintiff to show that the defendant's defense tactics in this litigation have been advanced in bad faith. The court finds the motions to adjudge various officers of PennWell guilty of perjury frivolous and overrules plaintiff's motions.

MOTIONS TO ADJUDGE VARIOUS PENNWELL ATTORNEYS GUILTY OF PERJURY AND CONTEMPT AND MOTION TO DISBAR THE PENNWELL ATTORNEYS

In support of his motions against the various attorneys, the plaintiff asserts that each has consciously and willfully flouted the oath of attorney required to practice in this court as well as Fed.R.Civ.P. 56(g) and Rule 11. The plaintiff alleges the violations by the attorneys stem from the removal of the original claim from Small Claims Court and the filing of a $300,000.00 counterclaim on the

defendant's behalf. The court finds the plaintiff's emotionally charged allegations of misconduct to be without merit and orders that plaintiff's motion to disbar PennWell's lawyers and the various motions to adjudge PennWell's lawyers guilty of perjury and contempt are overruled.

DEFENDANT PENNWELL PUBLISHING COMPANY'S MOTION FOR SANCTIONS

Defendant PennWell seeks snactions against the plaintiff for the multitude of pleadings filed by the plaintiff and the allegations of misconduct leveled at the defendant, its employees and attorneys. The court finds that in view of its disposition of the plaintiff's various filings and the court's admonition to the plaintiff regarding federal rule 11 at the March 19, 1987 status conference, that the defendant's motions for sanctions will be held in abeyance to be given further consideration if plaintiff's conduct persists in violation of Fed.R.Civ.P. 11.

DEFENDANT PENNWELL'S MOTION TO DISMISS

Defendant PennWell filed a motion to dismiss in the United States District Court for the Western District of Washington at Tacoma on November 4, 1986. The case was transferred from the District Court of Washington to this court and the defendant resubmitted its motion to dismiss on December 24, 1986, incorporating the argument of the original motion. The defendant's motion was directed at the second and third causes of action in the plaintiff's complaint. Defendant contends that Major's second and third causes of action fail to state a claim upon which relief can be granted and should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

The plaintiff's second cause of action is entitled Conspiracy to Deny Payment on on Defaulted Claim. Plaintiff's complaint alleges that the order of Judge Griffin transferring the action to the civil docket of Tulsa County District Court was

improper due to a conspiracy between the defendant and the judges involved. The plaintiff alleges that he was entitled to a default judgment in the Small Claims Court and therefore the transfer of the action from the Small Claims Division to the civil docket constitutes a conspiracy between Judge Wiseman, who allowed the transfer, and the defendant. The Court finds that the plaintiff's second cause of action is so lacking in factual allegations and proof that it must be dismissed pursuant to Fed. R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. Any impropriety of the transfer procedure in state court should be addressed on appeal by the state judiciary and the court finds that plaintiff has wholly failed to state a claim of conspiracy in his complaint.

The plaintiff's third cause of action alleges a cause of action for infliction of emotional distress. Under Oklahoma law, to

to state a claim for intentional infliction emotional distress the plaintiff must show such conduct that is "so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 (1977); Breeden v. League Services Corp., 575 P.2d 1373, 1376 (ok. 1978). As a basis for his intentional infliction of emotional distress claim, the plaintiff states that defendant's actions in terminating the contract, filing its answer and counterclaim in the Small Claims action, Judge Griffin's order in transferring the case to the civil docket, and PennWell's motion to remand the case from the United States District Court for the Western District of Washington constitute conduct which would support a claim for intentional infliction of emotional distress. In response to

defendant's motion to dismiss the third cause of action, the plaintiff advances the following allegation of his complaint as sufficient to withstand the motion to dismiss:

> "That PennWell and the Tulsa court should be attempting to destroy a man and his family financially, emotionall, and spiritually for no other reason than he attempted to bring a case to Small Claims Court is an order of immorality so extreme it represents a gross offense to human decency and a violation of basic human dignity. That PennWell and the Tulsa court should be attempting to accomplish this nefarious goal trhough a corruption in the profession of law and the system of justice means that they have not simply gone beyond the boundaries of civilized society; they have destroyed those boundaries from within.
>
> "The ongoing pattern of irrationality, lawlessness, and violence perpetuated by PennWell and the Tulsa court amount to not only outrage, but also a pure, unadulterated and unmitigated evil." (Major Complaint, page 181)

To prevail on a motion to dismiss for failure to state a claim upon which relief can be granted, defendant must establish the plaintiff can prove no set of facts in support of his claim that would entitle the

plaintiff to relief. Haines v. Kerner, 404 U. S. 519 (19720); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973). All factual allegations should be construed to the pleader. Gardner v. Toilet Goods Assn. 387 U.S. 167 (1967); Lee v. Derry-berry, 466 F.Supp. 30 (W.D. Okla. 1978); and Halliburton Oil Producing Co. v. Aetna Ins. Co., 491 F.Supp. 595 (W.D.Okla. 1978).

The court's review of the plaintiff's claim for intentional infliction of emotional distress reveals a lack of factual allegations which would support the tort claim. However, the court feels that under the standard previously articulated, Haines v. Kerner, supra, dismissal of the plaintiff's claim would be premature. While the court has considerable doubt the plaintiff would be entitled to recovery for the vaguely pled claim for intentional infliction of emotional distress, dismissal at this juncture is not proper under the liberal pleading format of the

Federal Rules of Civil Procedure. The court will, of course, entertain a motion for summary judgement on this issue at a later date supported by the evidence of the actual facts regarding plaintiff's termination. The defendant's motion to dismiss for failure to state a claim on the intentional infliction of emotional distress claim is hereby overruled.

1) MOTION TO ENTER DEFAULT JUDGMENT AGAINST DEFENDANT PENNWELL PUBLISHING COMPANY; 2) MOTION TO DECLARE A DEFAULT JUDGMENT AGAINST DEFENDANT'S FAILURE TO PROPERLY RESPOND TO PLAINTIFF'S MOTION TO ENTER DEFAULT, SUMMARY AND OTHER JUDGMENTS AGAINST DEFENDANT; 3) MOTION TO ADJUDICATE THIS CASE AND BRING IT TO A CLOSE 4) SUP PLEMENTAL MOTION TO ENTER DEFAULT, SUMMARY AND OTHER JUDGMENTS AGAINST PENNWELL; 5) MOTION TO ENTER ALL OF THE JUDGMENTS AG-AINST DEFENDANT FOR DEFENDANT'S FAILURE TO RESPOND PROPERLY TO SUPPLEMENTAL MOTION TO ENTER DEFAULT, SUMMARY AND OTHER JUDG-MENTS AGAINST PENNWELL

By the above cited motions the plaintiff seeks to supplement his original summary judment motions of December 22, 1986, and urges the court to enter judgment by default for failure of the defendant to respond in

timely fashion pursuant to Local Rule 14(a). The court finds the plaintiff's various motions in supplement to his original motion for summary judgment are without merit and overrules such motions. In the interest of justice the court will consider all of the filings of the plaintiff and defendant heretofore in deciding plaintiff's summary judment motion.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff filed his motion for summary judment on December 24, 1986, and sought judment on five causes of action. In light of the instant order and previous rulings by the court, the only remaining causes of action are the plaintiff's breach of contract claim and the intentional infliction of emotional distress claim. Therefore, the court will evaluate the plaintiff's motion for summary judgment only as to the remaining two courts of the complaint.

Summary judgment must be denied if a genuine issue of material fact is presented to the trial court. Exnicious v. United States, 563 F.2d 418, 425 (10th Cir. 1977). In making this determination, the court must view the evidence in the light most favorable to the party against whom judgment is sought. National Aviation Underwriters, Inc. v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir. 1977). Factual inferences tending to show triable issues must be resolved in favor of the existence of those issues. Luckett v. Bethlehem Steel Corp. 618 F.2d 1373, 1377 (10th Cir. 1980). The party moving for summary judgment has the burden of showing that there is no genuine issue of fact regarding the legal dispute, but the party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials contained in his pleading. The non-movant must set forth specific facts with supporting material showing that there is a genuine issue

for trial. Celotex Corporation v. Catrett, 477 U.S. ___, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc.,477 U.S. ___, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. F.D.I.C., 805 F.2d 342 (10th Cir. 1986).

Plaintiff's memorandum in support of his motion for summary judgment does not contain a statement of uncontroverted facts showing that no genuine issue of material fact remains which entitles him to relief. Clearly, there are numerous issues of fact remaining on the breach of contract issue. The affidavit of Robert Holton attached to defendant's response brief sets out that plaintiff breached the contract by producing work of unacceptable and unpublishable quality and by failing to make corrections as necessary. (See Affidavit, paragraphs 5,6,8, 10 and 11). Furhter, the defendant controverts the plaintiff's claim that his work met the highest editorial standards as guaranteed

by the contract provisions. (See Affidavit 5,6, and 8). The court finds that the plaintiff has not met his burden of showing that there is no genuine issue of fact regarding the contract dispute and therefore the motion for summary judgment is overruled.

The plaintiff's motion for summary judgment on the intentional infliction of emotional distress claim must also fail. In his motion for summary judment the plaintiff wholly fails to state uncontroverted facts which would merit judgment on this cause of action as required by Local Rule 14 of this court. In fact, the plaintiff's synopsis of his third cause of actions shows that summary judgment is not approrpriate. "This cause of action is based upon and validated by the objective foundation of the other causes, and rises from that foundation, which demonstrates that PennWell willfully intended to inflict that emotional distress. The experience of this distress is subjec-

tive. The only person who can bear witness to this cause of action is Major. He has borne witness to this emotional distress in his complaint." (See Memorandum in Support of Motion for Summary Judgment, pg. 40).

Viewing the evidence presented in the light most favorable to the party against whom the judgment is sought, the court finds that summary judgment ca-not be granted and hereby overrules the plaintiff's motion for summary judgment on his first and third causes of action.

The parties are ordered to adhere to the following schedule:

1. The defendant is directed to file its answer to the remaining counts of the complaint by April 30, 1987.

2. The parties are to exchange the names and addresses of all witnesses, in writing, along with a brief statement re each witness' expected testimony (not necessary if witness' deposition taken) by June 12,

1987.

3. The parties are granted until June 26, 1987, in which to complete discovery.

4. Final pretrial conference will be held on July 6, 1987, at 3:30 p.m.

5. The parties are to exchange exhibits and file an agreed pretrial order by July 9, 1987;

6. The parties are to file any trial briefs, requested voir dire and requested instructions on or before July 13, 1987;

7. The case is set for jury trial on July 20, 1987, at 9:30 a.m.

IT IS SO ORDERED this 21st day of April, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. MAJOR,	(stamped filed 6/3/87)
Plaintiff,	
v.	No. 86-C-1083-B
PENNWELL PUBLISHING COMPANY,	
Defendant.	

ORDER
DESIGNATING UNITED STATES MAGISTRATE
TO HEAR CERTAIN DISCOVERY MATTERS

Upon the Application of the Defendant, Penn-Well Publishing Company, and for good cause shown, the Court hereby orders and designates that the United States Magistrate shall hear and determine any matters which may arise during the taking of the deposition of Plaintiff Michael J. Major by the Defendant herein, such deposition to commence on June 16, 1987 at 9:00 a.m. and continue from day to day until completed.

IT IS SO ORDERED this 2nd day of June, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. MAJOR,	)	(stamped filed 7/22/87)
Plaintiff,	)	
	)	No. 86-C-1083-B
v.	)	
PENNWELL PUBLISHING COMPANY,	)	
Defendant.	)	

ORDER

This matter comes before the Court on the Plaintiff's Motion to Compel and Motion to Amend Complaint to include violation of the United States copyright laws. Permission to file the motions is granted and both motions are overruled for the reasons set forth below.

Under Fed.R.Civ.P. 15(a), once a responsive pleading to the complaint has been filed, the party may amend his complaint only by leave of the court. Leave is to be freely given "when justice so requires." However, the decision whether to grant leave to amend is clearly discretionary with the court. Zenith Radio Corp. v. Hazeltine Research, Inc.

401 U.S. 321, 330 (1971).

This is an action for breach of contract and intentional infliction of emotional distress. The Plaintiff alleges that he entered into a contract with the Defendant to write certain articles for Defendant's publication and that the Defendant breached its obligations under the contract and inflicted emotional distress in breaching the contract. Plaintiff now seeks to amend the complaint to include a violation of the United States copyright laws alleging that the Defendant's publication, Computer Graphics World IS publishing an an article in an upcoming issue which allegedly emanated from an idea submitted by the Plaintiff to the Defendant in 1985.

The Court finds the profered amendment to the complaint substantially unrelated to the instant action and prospective in nature in that it alleges a violation of copyright laws that will occur sometime in August, 1987.

The Court notes that the parties in this case have completed discovery, filed all dispositive motions, Proposed Findings of Fact and Conclusions of Law, and a joint Pretrial Order. The Plaintiff's attempted amendment of a matter unrelated to the breach of contract claim some ten days before the July 27, 1987 trial date is untimely. The Court in its discretion concludes that justice would not be served by granting the Plaintiff's application and the Defendant would be greatly prejudiced by the requested amendment at this late date. In light of the denial of the motion to amend, the Court finds that Plaintiff's companion motion to compel certain documents related to the proposed copyright claim is moot and denies this motion to compel.

IT IS THEREFORE ORDERED Plaintiff's Motion to Amend Complaint and Motion to Compel are hereby denied.

ENTERED this 22nd day of July, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. MAJOR,	(stamped filed 8/20/87)
Plaintiff,	
v.	No. 86-C-1083-B
PENNWELL PUBLISHING COMPANY,	
Defendant.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court sitting without a jury on July 27 and 28, 1987. The Plaintiff appears pro se and Defendant appears with counsel of record. Having considered all of the evidence, the arguments of counsel, and the applicable legal authorities, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff, Michael J. Major ("Major"), is a resident of the State of Washington.

2. The Defendant, PennWell Publishing Company ("PennWell"), is an Oklahoma corporation with its main offices located in Tulsa, OK.

3. PennWell owns and publishes a magazine known as Computer Graphics World ("CGW"), which is based in Littleton, Massachusetts.

4. On October 15, 1985, Major and David Pope ("Pope"), editor of CGW, entered into a written agreement (the "Contract") (Plff. Ex. 6), which provided that Major would write and sell to CGW the publication rights to six articles, to be written about the use of computer graphics by six different companies, in exchange for the sum of $800 for each article plus normal expenses. Major had previously written articles on other subjects for the Defendant which were acceptable to Pope. The articles herein involved industry technical writing as distinguished from reporting on news events.

5. In the contract, Major "guaranteed to CGW that Major's work would meet the highest editorial standards, that, if the Editor finds the work in any way unsatisfactory, the Author will make all the necessary corrections for

no added charge."

6. The highest editorial standars referred to in the contract are the editor's reasonable subjective standards for the particular publication.

7. The Computer Graphics World articles that were the subject of the agreement were to be written and provided on the following schedule:

(1) Boeing Computer Services ("Boeing article") due December 1, 1985;

(2) Marathon Oil Company ("Maraton article") due January 10, 1986;

(3) Martin-Marietta Energy Systems, Inc. ("Martin-Marietta article") due February 1, 1986;

(4) Radian article due March 1, 1986;

(5) Shepherd article due April 1, 1986;

(6) Babcock article due May 1, 1986.

8. In order to secure information and interviews from Marathon Oil Company ("Marathon") necessary to write the Marathon article, Major agreed with David Millard ("Millard"), a Marathon employee, that Major would submit the article

when written to Marathon for Marathon's review and that Major would make changes to the article to correct technical and content accuracy determined by Marathon.

9. Pursuant to the understanding, on November 16, 1985, Major sent a draft of the Marahon article to Millard at Marathon for his review.

10. On November 21, 1985, Millard called Major on the telephone to discuss the changes to the article which Millard felt were necessary to correct certain inaccuracies in the article. Major refused to discuss the matter beyond telling Millard to send in any corrections, was verbally abusive, cursed and hung up on Millard.[1]

[1]"Major misconceived Millard's suggestions for changes in the Marathon article as censorship, thereby implicating a First Amendment free speech issue. Major's conclusions in this regard were erroneous because Millard's concerns dealt essentially with article content, accuracy and misquotes. Major became indigant and told Millard to "go fuck himself" and hung up.

11. On November 21, 1985, Millard of

Marathon called CGW and spoke with Jenifer Wight ("Wight"), a CGW employee. Millard told Wight that Major refused to honor his agreement with Marathon to allow Marathon to review and require changes in the article, because many portions of the article contained errors of fact, and that Marathon might sue Major if the article was published without the corrections requested by Marathon. Millard further told Wight that Major had been verbally abusive, unprofessional, and hand hung up on Millard.

12. Millard indicated to Wight that Millard thought that Major was either an employee of CGW, or speaking with authority of CGW, based upon what Major told him. Wight assured Millard that Major was not a CGW but was a free lance writer.

13. On November 22, 1985, Millard wrote Major stating that the misrepresentations in the article would require a rewrite, and that because of Major's unwillingness to cooperate

with Marathon to create a factually and technically correct article, Marathon and Millard were withdrawing their consent to publication of the article or use of quotes from Millard. Millard also stated in the letter that he had personally advised CGW of such withdrawal of consent. (plff. Ex. 9).

14. With his letter of November 22, 1985, Millard sent to Major a copy of the Marathon article, with certain portions of the article circled in red ink, which Millard stated in his letter indicated some of the areas of inaccuracy of fact or impression which required correction.

15. On November, 1985, Major sent the Boeing article to CGW.

16. Sometime in early December, 1985, Stephen M. Porter ("Porter"), the CGW editor assigned to the Boeing article, wrote Major concerning the changes that needed to be made to the Boeing article. (Plff. Ex. 11). With his letter, Porter sent to Major a copy of the

Boeing article upon which Porter had made notes indicating the changes which were required to be made to the article to make it acceptable. Porter also called Major and discussed the changes which needed to be made to the article.

17. The Boeing article, as originally submitted, contained numerous correctable problems, both of style and content.

18. On December 24, 1985, Major sent to CGW the rewritten Boeing article and the Marathon article.

19. The rewritten Boeing article, as sent to CGW by Major, was still not in publishable form but Porter thought it essentially acceptable, as Porter would make needed corrections himself and so advised Major.

20. Sometime in late December, 1985, or early January, 1986, Tom McMillan ("McMillan"), managing editor of CGW, called Millard at Marathon to confirm the report that McMillan

had received from Wight regarding Millard's problems with Major.

21. Millard confirmed to McMillan that Major would not listen to Marathon's concerns about correcting inaccuracies in the article, was defensive and unprofessional, and hung up on Millard in response to some corrections which Millard had requested. Millard basically recounted the story he had given to Wight, and said there had been no further developments nor any improvement in the situation.

22. On January 14, 1986, a check in the amount of $820.83 was issued to Major from the PennWell office in Tulsa for payment of the Boeing article. (Plff. Ex. 26).

23. On January 16, 1986, McMillan wrote Major stating that CGW was terminating the contract. CGW terminated the contract because the Marathon article was factually inaccurate and not in keeping with the highest editorial standards, and further because

Major's conduct in dealing with the companies about which he was writing was unprofessional and, consequently, reflected poorly on CGW in public relations. Major, due to his inability to communicate with Millard of Marathon, was incapable of making necessary changes to make the Marathon article fit for publication. Major did not advise Porter (PennWell) of Millard's proposed changes in the Marathon article but Millard did.

24. The Marathon article failed to meet the highest editorial standards guaranteed by Major in the contract.

25. On January 21, 1986, Major wrote Pope and threatened to contact all of PennWell's advertisers and other third parties unless Major was paid in full for the Boeing and Marathon articles.

26. On January 25, 1986, Major sent Pope his proposed Martin-Marietta article,

following Major's termination.

27. On January 31, 1986, Betsy Riley ("Riley") of Martin-Marietta called Porter and indicated that the Martin-Marietta article contained misquotes and other inaccuracies.

28. Both Marathon and Martin-Marietta are important companies in the computer graphics industry, and CGW was concerned that its reputation was being damaged by Major's inaccurate writing and unprofessional conduct because Major represented or implied to the companies that he was a CGW writer.

29. On February 3, 1986, Robert Biolchini ("Biolchini") attorney for PennWell, wrote Major and warned him to not libel or defame PennWell when contacting its advertisers.

30. About the first of February, 1986, PennWell successfully placed a stop payment on the $820.83 check it had issued to Major for the Boeing article.

31. PennWell stopped payment on the check because it had been sent to Major before CGW learned from a Boeing employee that the Boeing article also contained factual inaccuracies and also because of the ongoing threats by Major to contact PennWell's advertisers about the dispute.

32. On February 14, 1986, Major wrote Philip C. Lauinger, Jr. ("Lauinger"), president of PennWell, and stated that he would send statements regarding the dispute to all of PennWell's advertisers and other third parties on a bi-weekly basis unless PennWell immediately paid him $4,305.59 under the contract plus $700,000 in damages. In the letter exchange PennWell threatened Major with a potential libel action.

33. In March and April of 1986, Major mailed four "newsletters" to PennWell's advertisers, PennWell's bank, and other third parties which were published by Major for the purpose of damaging PennWell's

business and reputation. (The issue of the libelous character of such "newsletters" is not before this Court.)

34. On April 21, 1986, Major wrote PennWell attorney Biolchini and stated that his "newsletters" had been sent to all of Pennwell's advertisers, its bank, and other third parties.

35. On May 31, 1986, Major wrote Lauinger and stated that Major was going to sue PennWell six times in the Tulsa County small claims court, one for each article under the contract. Major further stated he would "keep up his news coverage" of the dispute , and publish "letters of sympathy" he had received from PennWell advertisers who were "planning to cut back, if not completely eliminate advertising in PennWell's publications." He further stated that he would continue to send statements regarding the dispute to PennWell's advertisers.

36. On June 6, 1986, Major filed suit

against PennWell in the Tulsa County small claims court, seking $1,500.00 damages for PennWell's stop payment on the check sent as payment for his Boeing article.

37. On June 18, 1986, PennWell filed an Answer and a $300,000 previously threatened Counterclaim in the suit brought by Major, wherein PennWell asserted claims for libel and interference with business relationships against Major based upon his "news letters" to PennWell's advertisers and other third parties. PennWell sought actual and punitive damages, as well as injunctive relief against Major.

38. PennWell filed its Answer and Counterclaim purportedly in order to protect itself and recover any damages it suffered as a result of the "newsletters" sent by Major to PennWell's advertisers, bank and others, as well as Major's continuing threats to continue such activity.

39. Major dismissed his Oklahoma state

court small claims action without prejudice and refiled an action in the federal court of the State of Washington which as the instant action was transferred to this court.

40. PennWell's actions with regard to its dispute with Major were undertaken for the purpose of protecting PennWell and its conceived legitimate business interests.

41. None of PennWell's actions, including the termination of the contract, the stop payment of the check and the filing of its Answer and Counterclaim in the state court small claims proceedings, constituted extreme and outrageous conduct under the circumstances of this dispute.

42. PennWell, under the circumstances, was entitled to terminate the agreement with Major as it did on January 16, 1986. Major's own conduct and inability to communicate reasonably with PennWell, Marathon and Martin-Marietta were justification for PennWell's termination. PennWell was not motivated by

bad faith. PennWell did not intend to cause Major severe emotional distress in carrying on and attempting to resolve the dispute herein.

43. Because PennWell accepted the Boeing article, though not ready for final publication, Major is entitled to be paid the sum of $820.83 therefor.

44. Because the Marathon and Martin-Marietta articles did not comport with the highest editorial standards, Major is not entitled to be paid for them.

45. Throughout the litigation Major has in a prolix and imtemperate fashion, and without any factual support, asserted in the pleadings that this court and all other courts involved with this litigation have been bribed by and are in collusion with the Defendant, PennWell. Such claims and conduct are both spurious and frivolous in the context of Rule 11 of the Federal Rules of Civil Procedure. The issue of of appropriate

sanctions will be addressed below.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and parties herein. Venue is proper pursuant to 28 U.S.C. §1391(a) and (c).

2. Any Finding of Fact which might properly be characterized a Conclusion of Law is incorporated herein.

3. PennWell was entitled to terminate the contract with Major because:

A. The contract required that Major submit each article, after having made all necessary corrections, in a condition meeting PennWell's highest editorial standards as a condition precedent to PennWell's acceptance of and payment for the article.

B. Major materially breached the contract by failing to make the necessary corrections to the Marathon article, which failed to meet the highest editorial standards of PennWell for reasons including the

factual inaccuracies contained therein, and by failing to communicate and work in a professional manner with the companies about which he was writing, resulting in significant public relations problems for PennWell;

C. The Martin-Marietta article was submitted after the article had been terminated. The remaining three of the total six articles had not been submitted or written by Major

4. Major's breach of the contract substantially impaired the value of the entire contract, and gave PennWell sufficient grounds to believe that Major was either unwilling or incapable of producing articles of a sufficient quality and in a manner to satisfy the remainder of the contract.

5. In order to prevail upon a claim for intentional infliction of emotional distress, a plaintiff must prove, by a preponderance of the evidence, each of the following ele-

ments.

A. Extreme and outrageous conduct by the Defendant;

B. Defendant engaged in such conduct with the intent to cause Plaintiff severe emotional distress or with a reckless disregard of the possibility of causing Plaintiff severe emotional distress; and

C. Plaintiff suffered severe emotional distress as a result of such conduct of Defendant.

Breeden v. League Services Corp., 575 P.2d 1374, 1376 (Okla. 1978); Eddy v. Brown, 715 P.2d 74, 76 (okla. 1986). Major did not establish a claim under Oklahoma law for intentional infliction of emotional distress.

6. PennWell's motion for dismissal pursuant to Rule 41(b) is granted as to Major's claim for intentional infliction of emotional distress, because Major has failed to present

prima facie evidence to support such claim.

7. Specifically, Major has failed to present evidence of any conduct by PennWell which, under the circumstances, could be found to be extreme and outrageous, and has failed to present any evidence that PennWell's actions were undertaken with the intent ot cause Major emotional distress.

8. The Computer Graphics articles written about Marathon and Martin-Marietta by Major remain his property. The publication rights to the Boeing article are the property of PennWell (Computer Graphics World.)

9. Major is entitled to judgment in the amount of $820.83 pursuant to the contract for the Boeing article plus prejudgment interest from February 1, 1986, to the date of judgment. A separate Judgment contemporaneous with the filing of these Findings of Fact and Conclusions of Law shall be entered.

10. Relative to the sanctions imposed

pursuant to Rule 11 of the Federal Rules of Civil Procedure alluded to in Finding of Fact No. 45:

A. Major shall pay the sum of $300.00 into the Office of the Clerk of the Court. Said sum shall be obtained by the Court by PennWell paying the sum of $820.83, plus prejudgment interest from February 1, 1986 to the date of judgment, and post-judgment interst (as reflected in the accompanying Judgment), into the Office of the Clerk of the Court along with an appropriate release and satisfaction to be signed by the Court. The sanction sum of $300.00 will be withheld by the Clerk and the balance of said judgment will be paid by the Clerk to the Plaintiff, Michael J. Major upon appropriate receipt and release signed by Major. As further sanction, the parties are to pay their

own respective court costs. (The Court has tempered the imposed sanction against Michael J. Major after due and appropriate consideration of his poor financial condition and his demonstrated unfortunate emotional instability herein.)

ENTERED this 20th day of August, 1987.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

OK Stat. § 1757. Transfer of actions from small claims docket to another docket

On motion of the defendant the action may, in the discretion of the court, be transferred from the small claims docket to another docket of the court, provided said motion is filed and notice given by the defendant to opposing party by mailing a copy of the motion at least forty-eight (48) hours prior to the time fixed in the order for defendant to appear or answer and, provided further, that the defendant deposit the sum of Fifty Dollars ($50.00) as the court cost.

The motion shall be heard at the time fixed in the order and consideration shall be given to the hardship on the plaintiff, complexity of the case, reason for transfer, and other relevant matters. If the motion is denied, the action shall remain on the small claims docket. If the motion is granted, the court shall file an order transferring the action from the small

claims docket to another docket, and thereafter the procedure prescribed by Title 28 of the Oklahoma Statutes, Sections 151 to 157, shall prevail as to other costs, the action shall proceed as other civil actions and shall not proceed under the small claims procedure. Within twenty (20) days of the date the transfer order is signed, the plaintiff shall file a petition that conforms to the standards of pleadings prescribed by the Oklahoma Pleading Code. The answer of the defendant shall be due within twenty (20) days after the filing of the petition and the reply of the plaintiff in ten (10) days after the answer is filed. If the plaintiff ultimately prevails in the action so transferred by the defenant, a reasonable attorney's fell shall be allowed to plaintiff's attorney to be taxed as costs in the case.

OK Stat. § 1759. Claim, counterclaim, or setoff in excess of One Thousand Five Hundred Dollars

If a claim, a counterclaim, or a setoff is filed for an amount in excess of One Thousand Five Hundred Dollars ($1,500.00), the action shall be transferred to another docket of the disctrict court unless both parties agree in writing and file said agreement with the papers in the action that said claim, counterclaim, or setoff shall be tried under the small claims procedure. If such an agreement has not been filed, a judgment in excess of One Thousand Five Hundred Dollars ($1,500.00) may not be enforced for the part that exceeds One Thousand Five Hundred Dollars ($1,500.00). If the action is transferred to another docket of the district court, the person whose claim exceeded One Thousand Five Hundred Dollars ($1,500.00) shall deposit with the clerk the court costs that are charged in other cases, less any sums

that have been already paid to the clerk, or his claim shall be dismissed and the remaining claims, if any, shall proceed under the small claims procedure.

SPEEDY REPLY AND AGREEMENT FORM

(Please check your preference, and, if you wish to make an assignment, sign below. Keep one form for your records and return the second in the enclosed SASE.)

1)	BOEING	YES (x)	NO ( )	DEADLINE:	12/1/85
2)	MARATHON	YES (x)	NO ( )	DEADLINE:	1/10/86
3)	MARIETTA	YES (x)	NO ( )	DEADLINE:	2/1/86
4)	RADIAN	YES (x)	NO ( )	DEADLINE:	3/1/86
5)	SHEPHERD	YES (x)	NO ( )	DEADLINE:	4/1/86
6)	BABCOCK	YES (x)	NO ( )	DEADLINE:	5/1/86

The terms of agreement between the Author, MICHAEL J. MAJOR, and the Publication, COMPUTER GRAPHICS WORLD, for the Author's proposed work, titled - SEE ABOVE - are: a payment of $800 each minimum, plus normal expenses, for the leasing of first North American serial rights for the written work; and, if photos are included, one time editorial use in one issue for the photos;* a response to all communications within 30 days; and the printing of the byline, "Mike Major", beneath the title of the published work. Also, it is understood that the

Author's proposed work will be done on assignment, which means that the Publication will pay the Author, in full, within 30 days of its receipt of the Author's completed work** according to the terms of this agreement, and that the payment will be non-refundable. If, within one year of the Publication's leasing the Author's work, the Publication does not publish this work, then all rights revert to the Author. The Publication also agrees to send the Author three copies of the issue in which his work appears.

"I have read and agree to the above terms."

signed, DAVID POPE, EDITOR
COMPUTER GRAPHICS WORLD 10/18/85

The Author, Michael J. Major, guarantees that his proposed work will meet the highest editorial standards, that, if the Editor finds the work in any way unsatisfactory, the Author will make all the necessary corrections for no added charge. Unless other arrangements

are made, the proposed work will be delivered within three months of the assignment. If the Editor wants the work sooner, the Author will make every effort to comply. He will certify, in writing, the new, agreed-upon deadline. The Author affirms that he has never missed a deadline.

signed, MICHAEL J. MAJOR, PRESIDENT
MAJOR ENTERPRISES 10/7/85

* plus unlimited reprint rights for no added charge -- which means that PennWell may reprint articles & photos for promotional & other uses for no additional payment to the author. ** Payment period of 30 days starts only once Author has made any corrections or rewrites Editor may request.